Petition

81-1763

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

TIMOTHY J. SHANAHAN, III,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Jeffrey M. Miller, Esquire
NASUTI & MILLER
1325 Spruce Street
Philadelphia, PA 19107
(215) 545-8488
Attorney for Petitioner
Timothy J. Shanahan, III

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Whether separate convictions and sentences imposed upon Petitioner for both unlawful transportation of goods stolen from an interstate shipment and possession of those same goods under 18 U.S.C. §659 and 2314 are multiplicitous and thus violative of the Double Jeopardy Clause of the Fifth Amendment.

2. Whether the prosecutor's remarks to the jury during the Government's case-in-chief regarding the availability of certain evidence to the defense, and the suggestion that the defense introduce the evidence, constituted an impermissible shifting of the burden of proof in violation of the Fifth Amendment.

3. Whether the Sixth Amendment's protection of the attorney-client relationship from governmental intrusion should be extended to a pre-indictment target of a Grand Jury Investigation where the Government knows that said target is represented by counsel, but nevertheless utilizes an undercover agent who renders legal advice to the target and inquires into the defenses, tactics and strategies discussed by the target and his attorney in relation to the case.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of the parties to the proceeding in this Court.

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18 U.S.C. §2314

No.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

A copy of the Judgment Order of the United States Court of Appeals for the Third Circuit dated February 2, 1982 is contained in Appendix A. A copy of the Judgment Order of the United States District Court for the Eastern District of Pennsylvania dated April 23, 1981 is contained in Appendix B. A copy of the Judgment of Acquittal by the United States District Court for the Eastern District of Pennsylvania dated April 10, 1981 for Counts 2, 5, 8, 13, 14, and 19 of the Indictment is included in Appendix C. These Judgment Orders are as yet unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered and dated February 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, Amendment Six

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTES INVOLVED

18 U.S.C. §659
18 U.S.C. §2314

The pertinent text of these statutes is set forth in Appendix D.

STATEMENT OF THE CASE

This is a petition for certiorari arising from the following facts. On March 12, 1981, Petitioner was found guilty in the United States District Court for the Eastern District of Pennsylvania, after trial by a jury, of violating 18 U.S.C. §§2(a), 371, 549, 659 and 2314. These statutes proscribe aiding and abetting, conspiracy, the removal of goods from Customs custody and control, the possession and transportation of stolen goods which constitute interstate or foreign commerce, and the interstate transportation of stolen goods, respectively.

On March 24, 1981, Petitioner moved for a new trial and judgment of acquittal under Rules 29 and 33 of the Federal Rules of Criminal Procedure. The District Court ruled that the Government presented insufficient evidence to prove the illegal removal of goods from Customs custody and control as mandated by 18 U.S.C. §549. Accordingly, the District Court dismissed Counts 2, 5, 8, 13, 14, and 19 of the 21 count Indictment. Petitioner's remaining motions were denied.

Petitioner was sentenced on April 23, 1981. The District Court imposed concurrent two year terms of imprisonment on each of the remaining 15 counts of the Indictment and a $70,000 fine.[1] Imposition of sentence was stayed pending appeal to the United States Court of Appeals for the Third Circuit.

On January 8, 1982, the Court of Appeals requested counsel to submit a letter to the court commenting on the issue of multiplicitous convictions and the impact of *United States v. Garber*, 626 F.2d 1144 (3d Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981) on Petitioner's case. The question came up because Petitioner was involved in seven transactions involving transportation and possession of goods stolen from interstate commerce. For

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1. The District Court levied a $10,000 fine on each of Counts 1, 3, 6, 11, 15, and 17, and a $5,000 fine on each of Counts 9 and 21.

each of these seven transactions, Petitioner was convicted of both unlawful transportation and possession of the goods in violation of 18 U.S.C. §§2314 and 659.[2] Petitioner responded to the court's request on January 12, 1982.

On February 2, 1982, the Court of Appeals entered judgment affirming Petitioner's convictions. On February 14, 1982, Petitioner filed a motion to stay issuance of the court's mandate pending application to this Court for writ of certiorari. The court below granted the motion on February 23, 1982 and entered an order staying the mandate to March 25, 1982.

The narrative of events in this case begins in February, 1977, when Bernard Gilbert and Thomas McNellis, Sr., unlawfully agreed to remove and sell cocoa products from the Packer Avenue Marine Terminal (PMT), a marine storage facility located in Philadelphia, Pennsylvania. Gilbert was then a Clerk at PMT responsible for the discharge of cargo from incoming vessels. McNellis was the Operations Manager for Shanahan Motor Lines, a trucking concern owned by Petitioner. Beginning in January or February, 1977, Gilbert and McNellis engaged in the unauthorized removal, transportation and sale of cocoa products from PMT.

In the Spring of 1977, McNellis, fearing that Petitioner would learn of his illicit activities, advised Petitioner that he and Gilbert had been engaged in the legitimate removal and sale of pier overages from PMT during Petitioner's absence. Petitioner agreed to meet with Gilbert and McNellis to discuss a three party business arrangement.

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2. Counts 3 and 4 of the Indictment relate to the transaction of June 15, 1977. Counts 6 and 7 relate to the transaction of September 20, 1977. Counts 9 and 10 refer to a transaction on September 30, 1977. Counts 11 and 12 refer to October 1, 1977. Counts 15 and 16 refer to December 15, 1977. Counts 17 and 18 relate to the transaction of December 20, 1977, and Counts 20 and 21 concern a transaction on September 27, 1978.

In May or June of 1977, an agreement was reached whereby Gilbert would inform McNellis when overages were available and McNellis would arrange for their removal to Petitioner's warehouse in Camden, New Jersey. Petitioner would then locate prospective buyers for the goods and consummate the sales.

Between June, 1977 and September, 1978, Petitioner, Gilbert, and McNellis actually engaged in seven transactions involving cocoa products, coffee beans and tobacco.

In September, 1979, Gilbert and McNellis were charged in a federal criminal indictment with 17 violations of federal statutes concerning theft of goods from interstate commerce, removal from Customs custody, obstruction of justice, and aiding and abetting. Both Gilbert and McNellis entered guilty pleas and agreed to cooperate with the Government in its investigation in return for two year sentences.

A 21 count indictment was returned against Petitioner on October 15, 1980. On January 22, 1981, the Grand Jury returned a Superseding Indictment against Petitioner. The District Court dismissed the original Indictment on February 2, 1981. Trial commenced on March 4, 1981. The basis for federal jurisdiction of the District Court was 28 U.S.C. §1291.

Discovery revealed that during its investigation of this case, the Government directed an attorney, one Richard Brown, to secretly tape record a conversation with Petitioner although United States Customs, the investigative agency, had been expressly advised by Petitioner's counsel at the time, Anthony Caiazzo, Esquire, to refrain from any direct contact with Petitioner. (P.T. 2/26/81, 117-124).[3] This tape was made while Petitioner was the target of a Federal Grand Jury Investigation.

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3. P.T. refers to the transcript of the pre-trial hearing. It is followed by the date of the hearing and the relevant pages of the transcript. T. refers to transcripts of the trial. It is followed by the date and relevant page number.

The informer inquired into the strategy, tactics and intentions of Petitioner and his counsel and further offered legal advice to Petitioner with respect to the Grand Jury and a potential defense. (P.T. 2/26/81, 60-100). The contents of this taped discussion were directly communicated to Customs officials. (P.T. 2/26/81, 73-74).

At pre-trial hearings, the attorney-informer admitted that he had penetrated Petitioner's attorney-client relationship. (P.T. 2/26/81, 77). While the District Court refused to suppress the tape on Sixth Amendment grounds, it observed that the circumstances in which the tape was made caused the court great concern and presented a very close question. (P.T. 2/27/81, 57, 93).

In light of these facts, the Government chose not to introduce the tape at trial. However, the Government did elicit testimony from Brown about the tape. Following Petitioner's cross-examination, in which Brown reaffirmed that he was acting under Government direction and that the Government possessed the tape, the prosecutor rose from his seat, flipped the tape in the air and stated in open court:

> "Your Honor, I would make the tape available for Mr. Miller (defense counsel) to play if he sees fit. I have nothing further." (T. 3/7/81, 455).

During trial and on appeal, Petitioner argued that the prosecutor's actions and remarks were highly improper and amounted to an impermissible shifting of the burden of proof in violation of the Fifth Amendment's due process guarantee and the privilege against self-incrimination requiring a mistrial. Both courts rejected the argument.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

1. The Court of Appeals Below has Rendered a Decision in Conflict with Applicable Decisions of this Court and in Conflict with Decisions of Other Federal Courts of Appeals.

The Double Jeopardy Clause of the Fifth Amendment is designed to protect a defendant in a criminal case from multiple punishments for the same offense. Petitioner respectfully submits that this right was violated in his case because the convictions and sentences imposed by the District Court and affirmed on appeal under 18 U.S.C. §§2314 and 659 for both possession and transportation of goods stolen from an interstate shipment were multiplicitous.

To date, there are no cases dealing precisely with the construction of these statutes where separate convictions and sentences are imposed for transportation and possession. However, there are a number of cases decided by this Court and others under §659 and similar statutes holding that convictions for both theft and possession of the same goods are multiplicitous. *Heflin v. United States*, 358 U.S. 415 (1959); *United States v. Gaddis*, 424 U.S. 544 (1976); *United States v. Gilbert*, 553 F.2d 990 (5th Cir. 1977), *cert. denied*, 439 U.S. 913 (1978); *United States v. DiGeronimo*, 598 F.2d 746 (2d Cir.), *cert. denied*, 444 U.S. 886 (1979); *United States v. Garber*, 626 F.2d 1144 (3d Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981). Petitioner respectfully submits that these cases, and *United States v. Garber, supra*, in particular, apply with equal force to the case at bar, and that the imposition of separate convictions by the District Court, affirmed by the Court of Appeals for the Third Circuit, are in fatal conflict with the Third Circuit opinion in *Garber*. The convictions and sentences on the transportation charges should therefore be reversed.

In *United States v. Garber*, 626 F.2d 1144 (3d Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981), the defendants were convicted under 18 U.S.C. §659 of both stealing copper cathrodes from a foreign shipment and possessing those same cathrodes. On appeal, the Third Circuit vacated the conviction and sentence under the possession charge, holding that an individual could not be convicted of both theft from a foreign shipment and receipt or possession of the same goods from the same shipment under §659.

The reasoning of the court followed guidelines established by this Court in *Bell v. United States*, 349 U.S. 81 (1955) and *Heflin v. United States*, 358 U.S. 415 (1959), which held that, in the absence of clear and unambiguous congressional intent to the contrary, it is error to impose separate punishments on multiple aspects of the same offense. Since it was clear that stealing and possession were in fact different facets of the same act, the question was whether the legislative history of §659 revealed a clear intent to punish each aspect separately. Failing to find any such intent, the court concluded that it was error to impose multiple convictions.

In addition to provisions for unlawful taking and possession, §659 also has a provision against transportation of stolen goods in interstate commerce.[4] Petitioner stands convicted under Counts 9, 10, 20 and 21 of the Indictment with unlawful transportation and possession under §659. These charges involve two separate transactions. In each instance, the charges arise from the same transaction and involve the same products.[5]

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4. Paragraph seven of the statute provides:

"The carrying or transporting of any such (stolen) money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking . . ."

5. Count 9 charges that on or about September 30, 1977, Petitioner transported or caused to be transported from New Jersey to

Therefore, transportation and possession charges in this case are in fact multiple aspects of the same offense. The question, as in *Garber*, is whether Petitioner can be sentenced separately under those circumstances.

Section §659 specifically provides that, with respect to sentencing, transportation under the statute must be treated as an unlawful taking. Therefore, the convictions on Counts 9 and 10 for transportation and possession are equivalent, for purposes of sentencing, to convictions for unlawful taking and possession. This brings the *Garber* case into action. Since the court could not have imposed multiple sentences for unlawful taking and possession under *Garber*, it could not rightfully impose multiple sentences for transportation and possession for the same reasons. To do so was plain error.

In each of the remaining five transactions which gave rise to this case, Petitioner was convicted of unlawful possession under 18 U.S.C. §659 and unlawful transportation under 18 U.S.C. §2314. In relation to the counts charging transportation under §2314 instead of §659, it is Petitioner's position that the conduct proscribed by both statutes is the same, i.e.; transporting stolen goods in interstate or foreign commerce knowing the same to have been stolen. Therefore, the Government could not avoid the consequences of *Garber* by simply charging transportation under a different section of Title 18. *See*, e.g., *United States v. DiGeromino*, 598 F.2d 746 (2d Cir.), *cert. denied*, 444 U.S. 886 (1979) where the court ruled that convictions for theft under 18

Pennsylvania, certain tobacco products which he knew to be stolen from interstate commerce. Count 10 charges that Petitioner unlawfully possessed those same products on the same date. Count 20 charges that on September 27, 1978, Petitioner transported or caused to be transported from New Jersey to Pennsylvania certain coffee products which he knew to be stolen from interstate commerce. Count 21 charges that Petitioner unlawfully possessed those same coffee products on the same date.

U.S.C. §1951 and 659 were multiplicitous because the conduct proscribed under both statutes was functionally equivalent.

Even if this Court should decide that Congress did intend to provide for multiple convictions under §659 when a defendant is charged with both possession and transportation under that statute, the fact remains that there is no such provision where only possession is charged under §659 and transportation is charged under §2314.

There is no language in the legislative history of either statute, and no cases exist, which would indicate that when possession is charged under §659 and transportation is charged under §2314, a defendant should be treated as if he were convicted of both offenses under §659 alone.

This Court has determined that when multiple convictions and sentences are not clearly intended by Congress, the issue is to be resolved in favor of leniety:

> "We resolve an ambiguity in favor of leniety when required to determine the intent of Congress in punishing multiple aspects of the same criminal act." *Heflin v. United States*, 358 U.S. 415, 419 (1959).

For each of the transactions involved in this case, transportation and possession constituted different facets of the particular transaction. They were as much multiple aspects of the same offense as theft and possession were in *Garber*. The fact that the various aspects of Petitioner's conduct in each transaction were charged under different statutes does not change the cohesive nature of the conduct itself.

Since there is no evidence of congressional intent to impose multiple convictions in this situation, the standard pronounced in *Heflin, supra*, and adopted in *Garber*, must apply. From this it is clear that the convictions and sentences imposed for transportation under

§2314 must be reversed even if the Court should affirm the transportation convictions under §659.

2. The Court of Appeals has Rendered a Decision in Conflict with the Applicable Decisions of this Court.

As described in the Statement of the Case, *supra*, the Government chose not to play the "Brown tape" at trial. However, it did elicit testimony from Brown as to the making and general contents of the tape. Following cross-examination, in which Brown affirmed that he was acting under Government direction, the prosecutor flipped the tape in the air and challenged Petitioner, before the jury, to play the tape if he saw fit.

Petitioner respectfully submits that the prosecutor's words and actions resulted in an impermissible shifting of the burden of proof in contravention of the Fifth Amendment's due process guarantee and privilege against self-incrimination. The Government's impermissible conduct fits squarely within the doctrine announced by this Court in *Griffin v. California*, 380 U.S. 609 (1965). Therefore, the refusal of the District Court to grant Petitioner's motion for a new trial, affirmed by the Court of Appeals below, is in conflict with the spirit and purpose of *Griffin*.

In *Griffin*, this Court held:

> "[T]he Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecutor on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, *supra*, at 615.

The prosecutor's remarks can only be construed as a challenge to the defense to come forward and produce evidence. Where the law prohibits a prosecutor's com-

menting on an accused's failure to testify, a prosecutor's unsolicited speech to the jury, in which the accused is issued a clear and unequivocal challenge to produce evidence, must surely be condemned.

An alternate standard applies in determining whether a prosecutor's remarks constitute a deprivation of due process so as to warrant reversal of the conviction. The first question is whether the natural and necessary effect of the prosecutor's remarks is to comment on the accused's failure to testify. The second is whether the prosecutor's remarks were intended as a comment on the accused's failure to testify. If the natural and necessary effect of the prosecutor's remarks is to comment on the accused's failure to testify, or if the remark was intentionally made, then the *Griffin* prohibition has been violated. *United States v. Chaney*, 446 F.2d 571, 576 (3d Cir.) *cert. denied*, 404 U.S. 993 (1971); *United States v. Dansker*, 537 F.2d 40, 63 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Waller*, 607 F.2d 49, 50 (3d Cir. 1979); *United States v. Cianciulli*, 482 F. Supp. 585, 590 (E.D. Pa. 1979), *aff'd mem.*, 624 F.2d 1091 (3d Cir. 1980).

The natural and necessary effect of the Government's challenge in this case was to place Petitioner in a "Catch-22" situation. Regardless of whether Petitioner responded by action or inaction, the resolution of this conflict necessarily violated his Fifth Amendment rights. If, as happened, Petitioner chose not to introduce the tape recording, the jury must infer that the "Brown tape" contained highly incriminating evidence. On the other hand, if Petitioner responded to the Government's dare by playing the tape, then the accused would have been effectively coerced into going forward and producing evidence. Where, as here, the improper conduct occurred during the Government's case-in-chief, Petitioner chose not to testify in his own defense, and the impropriety involved Petitioner's own words as preserved on a tape recording, the sole effect of the prosec ı-

tor's conduct was an unconstitutional shifting of the burden of proof.

Furthermore, the prosecutor's remark was not innocuous or unintentional. He rose from his seat, flipped the tape in the air and offered it to Petitioner before the jury, knowing very well that the Government had not played it for fear of creating a prejudice which almost certainly would have caused reversal of the case on appeal. Such conduct was a deliberate and calculated challenge to the defense to play the tape instead.

A prosecutor's remark, although improper, is not generally held to constitute a violation of the *Griffin* rule where other witnesses are available to rebut or negate the Government evidence. *United States v. Heithaus*, 377 F.2d 484, 486 (3d Cir. 1967); *United States v. Giuliano*, 383 F.2d 30, 34 (3d Cir. 1967), *cert. denied*, 389 U.S. 1055 (1968). The "sole witness" rule is a judicially created exception to the *Griffin* prohibition. Where, as in this case, the *Griffin* violation concerned Petitioner's tape recorded statements, it defies reason to conclude that the prosecutor's conduct was amenable to rebuttal or negation by a witness other than Petitioner himself.

In this case, tape recordings were the crucial evidence in obtaining Petitioner's conviction. The Government's case hinged upon the jury's hearing of numerous tapes. Prior to Brown's testimony and the prosecutor's improper remarks, the jury had listened to eight hours of incriminating tape recordings over a two day period. In the context of Petitioner's trial, where the central focus of the entire proceeding was tape re rdings, Petitioner suffered extraordinary prejudice as a result of the prosecutor's challenge. The case should therefore have been reversed.

3. The Circumstances of this Case Present a Serious Question as to Whether Certain Sixth Amendment Protections Currently Afforded only to Individuals after Indictment Should be Extended to Pre-Indictment Targets of Federal Grand Jury Investigations.

At the outset, Petitioner acknowledges that at the present time the target of a grand jury investigation does not have an absolute right to counsel. *In Re Groban*, 352 U.S. 330, 333 (1957); *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

Nevertheless, Petitioner respectfully submits that the Sixth Amendment protection of the attorney-client relationship against governmental penetration should be extended to a pre-indictment intrusion where the circumstances of the case demonstrate that (1) had said intrusion occurred after indictment, it would have warranted dismissal of the indictment or reversal of the conviction, and (2) the pre-indictment intrusion directly contravened counsel's express notice to the Government not to contact his client and resulted in prejudice to the defendant by effecting the course of the investigation and subsequent trial.

When the "Brown tape," heretofore described in Petitioner's Statement of the Case, was recorded, both Brown and the Government were aware of three critical factors: (1) Petitioner was the target of a Grand Jury Investigation into the theft of goods from PMT; (2) Petitioner was represented by Anthony Caiazzo, an attorney, in connection with the Grand Jury Investigation, and (3) Anthony Caiazzo, Esquire had expressly and unequivocally forbidden the Government to communicate directly with Petitioner. Yet Brown, who was acting as a Government agent, was never advised to refrain from discussing matters involving the relationship between Petitioner and his attorney, or to avoid offering legal advice to Petitioner.

At trial, the Government elicited testimony from Brown about the making and existence of the tape. Inasmuch as the jury had already been exposed to other numerous incriminating tapes of Petitioner, the obvious inference was that the Brown tape contained incriminating evidence. The problem was compounded, as discussed in Argument 2 above, by the prosecutor's challenge to Petitioner in open court to play the tape.

Petitioner submits that under these circumstances, it is clear that had an attorney-client intrusion occurred after indictment, it would have amounted to a violation under *Massiah v. United States,* 377 U.S. 201 (1964), and more recently under *United States v. Levy,* 577 F.2d 200 (3d Cir. 1978) where the Third Circuit held:

> "We think that the injury into prejudice must stop at the point where attorney-client confidence are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case . . . [a] Sixth Amendment violation would be found where, as here, defense strategy was actually disclosed . . ." *Id.* at 209, 210.

Even under this Court's decision in *United States v. Morrison,* 449 U.S. 361 (1981), the existence of "demonstrable prejudice or a substantial threat thereof" would have been established because the contents of the tape were directly communicated to the Government during its investigation and formed part of its case against Petitioner. The adverse impact of such conduct on the fairness of the proceedings leading to Petitioner's conviction is obvious.

It is Petitioner's contention that where, as in this case, the target of a Grand Jury Investigation is represented by counsel in connection with the investigation, and the Government is aware that the individual is so represented and has been expressly forbidden to communicate with the individual without counsel's consent, then the Sixth Amendment protections afforded a "sus-

pect" or criminal defendant should extend to the target of a Grand Jury Investigation. To hold otherwise, sanctions the Government's commission of a *Massiah* violation by depriving the pre-indictment victim of any means of relief.

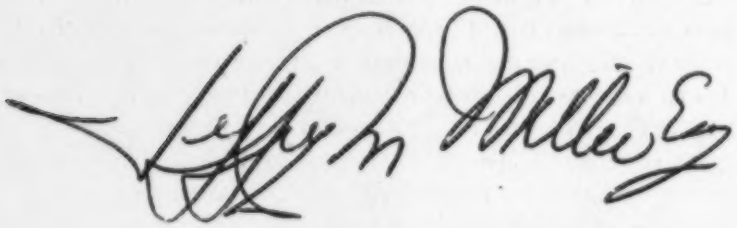
Surely, the contents of the "Brown tape" evidence the Government's defiant and improper penetration of Petitioner's attorney-client relationship. Because the violation occurred at the pre-indictment stage of the instant proceedings, the Government's wrongful conduct affected the entire proceeding thereafter. The Government's knowledge of Petitioner and his attorney's plans, strategies and tactics affected the progress of the investigation, the obtaining of the Indictment and the conduct of the trial itself. Therefore, an even stronger case for relief is presented here than in the post-indictment situation.

In conclusion, Petitioner respectfully submits that unless this Honorable Court is willing to recognize that the kind of intrusion which occurred in this case can and does prejudicially effect the entire course of proceedings to follow just as severely as if it had occurred after indictment, a "target" in Petitioner's position will be incapable of combating the impact of such improper conduct upon his constitutional right to a fair trial. For these reasons, Petitioner maintains that either the indictment should be dismissed, as requested by Petitioner before trial, or the conviction should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari should be issued to review the decision of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,



Jeffrey M. Miller, Esquire
Attorney for Petitioner
Timothy J. Shanahan, III

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1744

UNITED STATES OF AMERICA

v.

TIMOTHY J. SHANAHAN, III,

Appellant

(D.C. Crim. No. 80-00338-01)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
February 1, 1981
Before: GIBBONS, WEIS AND GARTH, *Circuit Judges*

JUDGMENT ORDER

Timothy J. Shanahan, III appeals from a judgment of sentence imposed following a jury verdict that he violated 18 U.S.C. §§ 371, 659 and 2314. He contends:

1. That there is insufficient evidence that the stolen goods were moving in or as a part of an interstate or foreign shipment;
2. That a statement by the prosecutor in the presence of the jury about the availability to the de-

fense of the "Brown" tapes impermissibly shifted the burden to the defendant;

3. That the district court permitted improper cross-examination of a character witness;
4. That it was a violation of the sixth amendment right to assistance of counsel or of due process for a government informant to engage defendant in an inculpatory pre-indictment conversation;
5. That the district court erred in failing to charge that making the "Gilbert" tapes violated Pennsylvania law.

These contentions lack merit.

It is O R D E R E D and A D J U D G E D that the judgment of the district court is affirmed.

BY THE COURT,

_____

Circuit Judge

Attest:

_____

Sally Mrvos, *Clerk*

Dated: February 2, 1982

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CR 80-00338—01

UNITED STATES OF AMERICA

v.

TIMOTHY J. SHANAHAN, III

Judgment and Probation/Commitment Order

Defendant appeared April 23, 1981 with counsel Jeffrey M. Miller, Esquire

Verdict of Guilty.

FINDING & JUDGMENT:

Defendant has been convicted as charged of the offense(s) of Aiding and abetting; Conspiracy; Possession and interstate transportation of goods stolen from interstate and foreign shipment; Interstate transportation of stolen property in violation of Title 18, United States Code, Sections 2(a), 371, 659 at 2314.

SENTENCE OR PROBATION ORDER:

The court asked whether defendant had anything to say why judgment should not be prononuced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS and shall pay a fine in the sum of TEN THOUSAND DOLLARS ($10,000) as to Count I.

As to Count III, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I, and in addition, shall pay a fine in the sum of TEN THOUSAND DOLLARS ($10,000).

As to Count IV, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I.

As to Count VI, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I and shall pay a fine in the sum of TEN THOUSAND DOLLARS ($10,000).

As to Count VII, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I.

As to Count IX, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I and shall pay a fine in the sum of FIVE THOUSAND DOLLARS ($5,000).

As to Count X, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I.

As to Count XI, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with sentence imposed on Count I and shall pay a fine in the sum of TEN THOUSAND DOLLARS ($10,000).

As to Count XII, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with sentence imposed on Count I.

As to Count XV, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I and shall pay a fine in the sum of TEN THOUSAND DOLLARS ($10,000).

As to Count XVI, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I.

As to Count XVII, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I and shall pay a fine in the sum of TEN THOUSAND DOLLARS ($10,000).

As to Count XVIII, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I.

As to Count XX, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I.

As to Count XXI, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, concurrent with Count I and shall pay a fine in the sum of FIVE THOUSAND DOLLARS ($5,000).

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at anytime during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION:

The court orders commitment to the custody of the Attorney General and recommends, Eglin Air Force Base, Florida.

All sentences of imprisonment are imposed pursuant to 1S U.S.C. §4205(b)(2).

Donald W. VanArtsdalen J.

Dated: April 23, 1981

APPENDIX C

UNITED STATES OF AMERICA	:	
vs.	:	Criminal No.
TIMOTHY J. SHANAHAN, III	:	80-00338—01
	:	

JUDGMENT OF ACQUITTAL/NOT GUILTY

AND NOW, this 10th day of April, 1981, came the attorney for the Government and the defendant being present with counsel, and

☒ The Court having granted the defendant's motion for judgment of acquittal as to Counts 2, 5, 8, 13, 14 and 19

☐ A jury has been waived, and the Court has found the defendant not guilty as to _____

☐ The jury has returned its verdict, finding the defendant not guilty as to _____

AND IT IS THEREFORE ORDERED that Judgment in accordance with the above finding is hereby entered pursuant to Rule 32(b), Federal Rules of Criminal Procedure.

BY THE COURT:

_____

Donald W. VanArtsdalen J.

xc: U.S. Marshal
Probation Office
Counsel

_____ _____

DATE BY WHOM

Cr1 4/78

APPENDIX D

The United States Code, Act of June 25, 1948, C.645, 62 Stat. 729; As Amended Oct. 14, 1966, Pub. L. 89-654, §1(a)-(d), 80 Stat. 904, *18 U.S.C. §659* provides in pertinent part:

§ 659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or

foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

The United States Code, Act of June 25, 1948, c.645, 62 Stat. 806; As Amended Sept. 28, 1968, Pub.L. 90-535, 82 Stat. 885, *18 U.S.C. §2314*:

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or

money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1763

In the Supreme Court of the United States

OCTOBER TERM, 1981

TIMOTHY J. SHANAHAN, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that he cannot properly be convicted and sentenced for both possession and transportation of the same stolen goods, (2) that the prosecutor improperly commented on his decision not to testify, and (3) that a pre-indictment conversation with a government informant outside the presence of his lawyer violated his Sixth Amendment right to counsel.

1. After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on seven counts of possessing goods stolen from an interstate or foreign shipment, in violation of 18 U.S.C. 659 (Counts 4, 7, 10, 12, 16, 18, and 21); two counts of transporting in interstate commerce goods stolen from an interstate or foreign shipment, in violation of 18 U.S.C. 659 and 2 (Counts 9 and 20); five counts of transporting stolen

goods in interstate commerce, in violation of 18 U.S.C. 2314 and 2 (Counts 3, 6, 11, 15, and 17); and one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371 (Count 1). He was sentenced to concurrent two-year terms of imprisonment on each count. In addition, he was fined $10,000 on each of Counts 1, 3, 6, 11, 15 and 17, and $5,000 on each of Counts 9 and 21. The court of appeals affirmed by judgment order (Pet. App. A1-A2).

The evidence adduced at trial showed that petitioner was the president of Shanahan Motor Lines, a trucking company engaged in the transportation and sale of "overages" (dock accumulations) from marine terminals to salvage companies. S.A. 1a-4a.[1] Beginning in June 1978, petitioner and two associates engaged in a scheme to steal "overages" from the Packer Avenue Marine Terminal (PAMT) in Philadelphia. Pursuant to this scheme, the chief clerk at PAMT would identify goods to be stolen, and petitioner's operations manager would arrange for the transportation of the designated goods to petitioner's warehouse. Petitioner then managed the ultimate sale of the goods. Petitioner kept 50% of the proceeds from the sales, with the other participants in the scheme receiving 25% each. S.A. 5a-8a. In all, petitioner and his associates engaged in seven separate transactions involving the theft and sale of "overages."

2. Petitioner contends (Pet. 7-11) that he cannot be convicted and sentenced for both possession and transportation of the same stolen goods.[2] This claim plainly does not

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[1]"S.A." refers to the government's supplemental appendix in the court of appeals.

[2]Petitioner failed to raise the issue on appeal. The court of appeals, however, requested both sides to address the issue by letter after oral argument in this case.

merit review under the concurrent sentence doctrine.[3] In any event, it is without merit.

Petitioner relies on several cases, including a decision of the court below, which hold that convictions for theft and receipt or possession of the same goods are improper. *United States* v. *Gaddis*, 424 U.S. 544 (1976); *Heflin* v. *United States*, 358 U.S. 415 (1959); *United States* v. *Garber*, 626 F. 2d 1144 (3d Cir. 1980), cert. denied, 449 U.S. 1079 (1981). Here, however, petitioner was not convicted for theft and possession of the same goods, but for their possession and interstate transportation. With regard to two of the transportations, petitioner was charged with unlawful transportation and possession under 18 U.S.C. 659 (Counts 9 and 20). Congress has expressly provided in Section 659 that the transportation of goods in interstate or foreign commerce "shall constitute a separate offense" from the other offenses under that statute. 18 U.S.C. 659. Accordingly, at least in relation to those two transactions, petitioner's possession and transportation convictions are not multiplicitous. The unlawful transportation count for the remaining five transactions was charged under 18 U.S.C. 2314 instead of Section 659 (Counts 3, 6, 11, 15 and 17). In light of the clear congressional intent expressed in Section 659 that transportation of goods stolen from an interstate or foreign shipment constitutes a crime separate from possession, however, it could make no possible difference whether the unlawful transportation was charged

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[3]Petitioner was sentenced to concurrent two-year prison terms on each count, and was fined on only one of the two counts—either the possession count or the transportation count—relating to each of the seven transactions in this case. Petitioner's conviction and sentencing for both possession and transportation therefore did not increase in any manner the clearly permissible severity of his punishment, nor is there any realistic possibility that petitioner could suffer adverse collateral consequences as a result of the additional convictions.

under Section 659 or Section 2314. In either case, Congress has proscribed separate crimes that can be separately charged, tried, and punished.

3. During the investigation of this case, Richard Brown, who had earlier purchased stolen commodities from petitioner, secretly recorded a conversation with petitioner at the government's request (App. 231a-232a).[4] The tape of the conversation was made available to petitioner as a part of discovery months prior to trial (S.A. 13a-15a). At trial, the government elected not to play the tape and so notified the defense (S.A. 16a-17a). Without objection, the government had Brown summarize the recorded conversation in his trial testimony. During cross-examination of Brown, defense counsel established that the government and not Brown had possession of the tape (S.A. 20a). In an implicit attempt to suggest that the government was suppressing the tape, defense counsel then asked Brown (*ibid.*): "If [the tape] is going to be played by anybody, you can't play it?" At the conclusion of redirect examination, the prosecutor stated, "Your Honor, I would make the tape available to [defense counsel] to play if he sees fit" (App. 244a). Relying on *Griffin* v. *California*, 380 U.S. 609 (1965), petitioner contends (Pet. 11-13) that the prosecutor's statement somehow shifted the burden of proof by violating his privilege against self-incrimination.

In *Griffin*, this Court held that the Fifth Amendment prohibits prosecutorial and judicial comment that a defendant's decision not to testify may be evidence of guilt. Here, however, there was no comment, direct or indirect, on petitioner's failure to testify. Rather, the obvious purpose of the prosecutor's statement was to make the tape available to the defense to use in any further cross-examination of

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[4] "App." refers to petitioner's appendix in the court of appeals.

Brown. Further, the offer to make the tape available was a legitimate response to defense counsel's implicit and false suggestion that the government was suppressing the tape.[5]

4. Petitioner contends (Pet. 14-16) that his tape-recorded conversation with Brown outside the presence of his lawyer at a time when the government knew that he was represented by an attorney in connection with an ongoing grand jury investigation violated his Sixth Amendment right to counsel. But, as this Court stated in *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972), "[i]n a line of constitutional cases * * * it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." In the face of this authority, petitioner's attempt to have the right to counsel extended to the pre-indictment investigative activity of the government must fail. See *Rhode Island* v. *Innis*, 446 U.S. 291, 300 n.4 (1980).[6]

Petitioner finally argues that Brown, an attorney, improperly gave him legal advice during the tape-recorded conversation and that, as a result of the conversation, the government learned of the "plans, strategies and tactics" of the defense (Pet. 16). During the conversation there was

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[5]Contrary to petitioner's repeated assertions (Pet. 6, 11, 13), there is nothing in the record to indicate that counsel for the government flipped the tape recording into the air while speaking. Indeed, in his brief before the Third Circuit, government counsel denied petitioner's allegation of such conduct (Br. for Appellee at 8 n.2).

[6]Petitioner objects (Pet. 14) that the government precipitated his conversation with Brown despite the fact that his lawyer "had expressly and unequivocally forbidden the Government to communicate directly with [him]." Under *Kirby*, however, petitioner's lawyer had no authority to prevent the government from communicating with petitioner, and adoption of such a rule would unduly intrude upon the legitimate investigative authority of the government. See *United States* v. *Gray*, 565 F. 2d 881, 891 (5th Cir. 1978).

some discussion of the grand jury's subpoena power (App. 66a), of petitioner's options before the grand jury (App. 99a-101a), of possible defenses available to petitioner (App. 67a-68a), and of the advisability of retaining a large New York law firm to delay the proceedings (App. 69a). Petitioner also related the advice his attorney gave him regarding the dangers of perjury (App. 83a-84a). There is no suggestion in the record, however, that Brown initiated any of these discussions. Indeed, Brown testified that the discussions were initiated by petitioner (S.A. 24a). Brown further testified that he had no intention to "feed" information to petitioner's attorney and that everything he told petitioner was true (S.A. 25a). Moreover, there was no revelation during the conversation of anything that could remotely be characterized as "trial strategy." In the absence of any overreaching by the government or any prejudice to petitioner, there is simply no basis for dismissing this indictment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

DOJ-1982-05